

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION
NO. 4:09-CV-181-D

REX T. GILBERT, JR. and DANIELA L.
GILBERT,

Plaintiffs,

v.

DEUTSCHE BANK TRUST COMPANY
AMERICAS, AS TRUSTEE FOR
RESIDENTIAL ACCREDIT LOANS, INC.,
DAVID A. SIMPSON, P.C., SUBSTITUTE
TRUSTEE, RESIDENTIAL FUNDING,
LLC, GMAC MORTGAGE, LLC, AND
OCWEN LOAN SERVICING, LLC

Defendants.

**STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Local Civil Rule 56.1

NOW COME Defendants, pursuant to Local Civil Rule 56.1, and file their Statement of Material Facts, setting forth in numbered paragraphs the material facts to which there are no genuine dispute, with citations to the admissible evidence in support of each numbered paragraph. Attached hereto is Defendants' Appendix to Local Civil Rule 56.1 Statement of Material Facts which includes the affidavits, deposition testimony, exhibits, and responses to discovery requests, cited herein.

STATEMENT OF MATERIAL FACTS

1. On May 5, 2006, Plaintiffs borrowed \$525,000.00 from the First National Bank of Arizona (the “Loan”) and refinanced a prior mortgage loan on their property, 134 West End Road, Ocracoke, North Carolina 27960 (the “Property”). (Am. Compl. ¶ 9 and Ex. 2.)

2. Plaintiffs’ note was an adjustable rate note and had an interest-only addendum. (Am. Compl. Ex. 2-3.)

3. GMAC Mortgage Corporation approved Plaintiffs for a loan modification in 2008. The loan modification required that Plaintiffs “make a lump sum payment of \$8051.40 by 1 October 2008.” (Am. Compl. ¶ 63.) According Plaintiffs’ own complaint, “Plaintiffs were unable to make the lump sum payment required to qualify for the loan modification”. (*Id.* ¶ 64.)

4. In 2008, Plaintiffs defaulted on their loan payments. *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 274 (4th Cir. 2012).

5. In 2009, David A. Simpson, P.C., as Substitute Trustee, brought a foreclosure suit (“State Foreclosure Action”). *Id.*

6. On June 17, 2009, the Clerk of the Hyde County Superior Court ordered the foreclosure sale of the Property; this order, however, was reversed by the North Carolina Court of Appeals on May 3, 2011. *Id.*

7. As part of the closing of the Loan, Plaintiffs acknowledged “reading and receiving a complete copy” of a Truth in Lending Disclosure Statement (the “TIL Statement”) on May 5, 2006. (Am. Compl. Ex. 4.)

8. Plaintiffs’ TIL Statement identifies an APR of 7.953%, an Amount Financed of \$507,473.43, and a Finance Charge of \$943,469.57. (Am. Comp. Ex. 4.)

9. According to Plaintiffs' expert, Dr. Richard S. Warr, the APR should have been 7.718%, the Amount Financed should have been \$516,639.24, and the Finance Charge should have been \$922,557.45. (Defs.' Mot. Summ. J. Ex. A-1, at 4.)

10. The difference between the APR listed on the TIL Statement (7.953%) and what Dr. Warr identifies as the correct APR (7.718%) is 0.235%. (*Id.*)

11. The TIL Statement understated the amount financed and overstated the finance charge. (*Id.*)

12. Plaintiffs' expert used the 6-month LIBOR rate from April 5, 2006 to compute the payment schedule for the loan. (Defs.' Mot. Summ. J. Ex. A-1, at 3.)

13. The Loan's closing date was May 5, 2006. (Am. Compl. ¶ 23.)

14. The LIBOR rate as of May 2, 2006, was 5.289%. (Defs.' Mot. Summ. J. Ex. A-2, at 1.)

Respectfully submitted, this the 13th day of May, 2016.

BRADLEY ARANT BOULT CUMMINGS, LLP

/s/ Mark S. Wierman

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LLC*

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2016, I served a true and correct copy of the foregoing **STATEMENT OF MATERIAL FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** using the Court's electronic filing system, which will deliver a copy of the foregoing to:

Kathryn Parker-Lowe
35 Miss Elecia Lane, Suite 101
P.O. Box 730
Ocracoke, North Carolina 27960

David A. Simpson, P.C.
Substitute Trustee
Post Office Box 19972
Charlotte, NC 28219

/s/ Mark S. Wierman
Mark S. Wierman
ATTORNEY FOR DEFENDANTS